Good morning. My name is James W. Cuminale. I am the Senior Vice-President and General Counsel of PanAmSat Corporation. I am pleased to have the opportunity to testify before you once again. There have been a number of significant developments since I appeared before you in July 1997 — developments that are relevant to this Committee's consideration of S. 2365.

These developments include House passage of H.R. 1872, the FCC's DISCO II action and its action on Comsat's petition requesting regulatory treatment as a non-dominant carrier, and the completion of Intelsat's spin off of its New Skies subsidiary.

The relevance of these developments is twofold. First, they establish that Intelsat's quasi-governmental status and the benefits that Comsat derives from that status confer marketplace power upon both entities. Second, they show that Intelsat's restructuring efforts to date have failed to produce a private company that is independent of Intelsat. If the future course of Intelsat restructuring produces a similar result, the international satellite marketplace will not be truly competitive. I will discuss each development before turning to specific comments on S. 2365.

Intelsat/Comsat Market Power

In the Comsat dominant carrier proceeding and the DISCO proceedings, the FCC has found that the combination of Intelsat's extensive satellite network, the vertical integration of its services with services provided by telecom monopolies throughout the world, and its privileges and immunities give Intelsat a dominant place in the international satellite market. Comsat, as the exclusive reseller of Intelsat capacity in the United States, "imports" Intelsat's dominance into our market.

The FCC analyzed a mountain of evidence and reaffirmed that there are some quite significant satellite markets in which Comsat has the power to price without competitive constraints. These include telephony services to 63 "thin route" countries and occasional video news gathering and event-oriented services in 142 countries. These countries represent large potential growth markets for satellite services because they lack fully developed terrestrial communications infrastructures.

As to these markets, the FCC simply did not accept Comsat's argument that there is no need to regulate it as a dominant carrier:

> We believe that enforcement of the Commission's dominant carrier tariff rules is necessary because Comsat's customers may not switch to other providers if Comsat charges rates above competitive levels. …U.S. consumers or authorized carriers must use Comsat for switched voice, private line and occasional-use video services to and from the U.S. market. U.S. consumers and authorized carriers are unable to switch to alternative suppliers because there are none. The only unutilized excess capacity to these markets to and from the U.S. is controlled by Comsat through INTELSAT. Due to the absence of price competition and choice among service providers in dominant markets, enforcement of the Commission's dominant carrier tariff rules and rate of return

> regulation is necessary to ensure that Comsat continues to charge just and reasonable rates in these dominant markets. ("In the Matter of COMSAT CORPORATION; Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier," 11 Comm. Reg. (P&F) 1218, 1252 (1998).

In addition to the FCC actions, the overwhelming adoption of H.R. 1872 by the House of Representatives has sent an unmistakable message that the pro-competitive restructuring of Intelsat is of critical importance and that competition would be harmed by a bad restructuring. H.R. 1872 also would eliminate Comsat's over-36 year-old monopoly on access to Intelsat and the unfair advantages that Comsat gets from its exclusive participation in Intelsat.

Intelsat's Own "Privatization" Effort

After almost three years of debate within Intelsat regarding privatization of some of its assets, Intelsat adopted a plan to spin off a subsidiary. Despite some very effective work by the U.S. government participants in this process, the negotiations did not result in a pro-competitive restructuring of Intelsat or even create a private company standing at arms' length from Intelsat.

First, Intelsat is completely unaffected. The spin-off company receives only five out of 25 of Intelsat's operating satellites and there is no change whatsoever in Intelsat's charter. Intelsat post-spin off is, for all intents and purposes, the same as Intelsat pre-spin off.

Second, New Skies is not independent of Intelsat in any meaningful sense. Rather, future events will determine whether the new company will be truly independent of its progenitor. The U.S. official position is that the many present uncertainties about the spin off "will ultimately determine whether the result is in fact pro-competitive, or whether the result is unacceptable from a competition law and policy perspective." (Statement of the Party of the United States, March 31, 1998).

Indeed, if Intelsat and its signatories give more than lip service to the competitive safeguards that are supposed to be observed with respect to New Skies, the spin off could well be a model for the privatization of Intelsat itself, as the first of several private companies to be split off from the inter-governmental organization. But great care must be exercised regarding the next phase of Intelsat privatization.

Based on Intelsat's own statements about the future of the organization, PanAmSat is concerned that Intelsat is well on the road to a competitively-unacceptable privatization. Some residual intergovernmental entity may be retained for so-called lifeline services, but most of Intelsat simply will be declared "private." This "private" Intelsat would retain, however, all the advantages that were conferred upon it as an inter-governmental satellite organization; its universal, and in some cases exclusive, market access; its ownership by and relationships with the key telecommunications entities in each country, who will have a

vested interest in making the private Intelsat successful; its prime orbital slots and radio frequencies in each region of the world, which were acquired without struggling with other applicants before the FCC or any other regulatory body; and the largest fleet of in-orbit and under-construction satellites, many of which were purchased with below-market financing. This kind of Intelsat privatization would distort competition in the extreme.

Against this back-drop, I will discuss PanAmSat's position on S. 2365.

Comments on S. 2365

S. 2365 admirably states the policy objectives of creating a competitive marketplace for international satellite communications; one in which consumers reap the benefits of competition in the form of advanced communications services at competitive rates. S. 2365, however, relies too heavily on the assumed good motives of the Intelsat participants and fails to provide incentives for pro-competitive behavior and disincentives for anti-competitive results.

The fundamental weakness in implementing the objectives set out in Section 4(a), is that Section 4(b) directs only the U.S. party and Comsat to work within the Intelsat privatization process to achieve these objectives. There are two problems with this. First, Comsat has an inherent conflict of interest in trying to achieve a truly pro-competitive privatization of Intelsat, because its investment in Intelsat would not be as valuable in a completely competitive environment as it would in a market in which Intelsat retains a dominant position. One only has to read the newspapers to know how important a concern that really is for Comsat.

Second, negotiations among Intelsat members is not likely to produce a pro-competitive result in the upcoming, and most critical, phase of Intelsat privatization. Intelsat's self-interest simply is to maintain as much as possible the benefits that were conferred upon it as an inter-governmental organization. Goals such as market access for competitors will never be a high priority for Intelsat, although they are for U.S. consumers. Therefore, U.S. policy makers should use all the mechanisms at their disposal to influence Intelsat.

Although S. 2365 enjoins the Secretary of State to conduct a "vigorous" program of negotiations, vigor alone cannot carry the day. Intelsat must be motivated toward true reform by using access to the U.S. market as the incentive. We know of no better incentive. Intelsat and its members must be presented with the hard choice of giving up the market dominance that has come to them from their privileged governmental status or not serving the lucrative U.S. market.

Section 5 of S. 2365 sets out the principles by which the FCC is intended to regulate telecommunications

services that use the facilities of intergovernmental satellite organizations and their successors and affiliates. In general, these requirements are inadequate to protect against a distortion of competition by such entities and they would dramatically add new regulatory burdens on private satellite operators and users.

The problems that legislation should deal with are Intelsat's immunity from regulatory oversight and legal recourse; Intelsat's and Comsat's market power in thin route telephony and occasional video services, as found by the FCC; and Comsat's monopoly on access to the Intelsat system. S. 2365 ignores these problems. The new Section 601 of the Telecom Act that would be added by S. 2365, for example, requires only that the "person" making the application to use the facilities of Intelsat would be subject to the same rules as everyone else, including a waiver of privileges and immunities. But the real problem is that Intelsat has the privileges and immunities, not the person, such as AT&T or CBS, applying to use Intelsat space segment. S. 2365 would leave Intelsat's privileges and immunities intact.

Moreover, with respect to Comsat — the only conceivable applicant who does enjoy immunity — the bill would require a waiver of immunity only for Comsat's U.S. domestic use of Intelsat's space segment, leaving Comsat's immunity in place with respect to international services.

Furthermore, in terms of using access to the U.S. market as leverage to foster a pro-competitive privatization of Intelsat, the new §602 would do nothing more than codify the FCC's existing DISCO II requirements, which, while useful, do not assure a pro-competitive restructuring of Intelsat.

The new §603 also misses the mark when it sidesteps an opportunity to end Comsat's monopoly on access to Intelsat. Direct access would be permitted only for "thin route" and Sub-Saharan African countries, which, while important, do not constitute more than 20% of Comsat's Intelsat's traffic. And, although, the FCC found that Comsat monopoly gives it market power with respect to non-full time video services to 142 countries, the bill would not permit direct access for such services. Moreover, because of S. 2365's definition of "direct access," even the very limited access allowed under the bill would perpetuate Comsat's monopoly on investment in Intelsat.

The new §603 also sidesteps the problem of Intelsat's hoarding orbital slots. The bill instructs the FCC to crack down on those warehousing slots without coming to grips with the fact that the FCC has no jurisdiction over Intelsat, who is the real offender in this regard.

S. 2365 also moves further in the wrong direction by creating new regulatory burdens for the customers and competitors of Intelsat and Comsat and for the customers of all satellite operators. For example, the new §601 would require millions of users of receive-only satellite dishes, including tiny DBS dishes, to be licensed by the FCC no matter whether they receive service from Intelsat or U.S. licensed satellite

operators. S. 2365 also would burden Comsat's customers by taking away the FCC's discretion to apply its "fresh look" doctrine to Comsat's long-term contracts, which were entered into when there was no competitive alternative to Comsat. In doing so, S. 2365 will cost telecom carriers and consumers millions and millions of dollars.

The new §603 would, for the first time, also require that all satellite operators be regulated as common carriers to create so-called regulatory parity with Comsat, who is regulated as a common carrier. However, Comsat is regulated as a common carrier because it has market power and such regulation is one means of protecting consumers from the exercise of that power. Other satellite operators do not have such market power and do not require common carrier regulation to protect consumers. So nothing would be accomplished by this provision except to place new obstacles in the path of Comsat's competitors.

Section 6 of S. 2365 would lift the existing statutory restriction that prevents a single entity from acquiring a greater than 10% ownership stake in Comsat. This cap was intended to prevent a private company from buying Comsat just to acquire its monopoly right to access the Intelsat system. Once that restriction is lifted by S. 2365, someone could come forward just to buy Comsat's monopoly. Having a telecommunications monopoly is a unique privilege in 1998 and it should not be for sale.

Section 6(e) also contains an assumption that Intelsat will be privatized in one single step as a single entity in a single initial public offering. This assumption confirms our worst fears about the next phase of Intelsat privatization. If it is permitted, Intelsat will then be the world's largest satellite company, bar none, with the most international orbital slots (and with more than twice as many satellites as its nearest international competitor), with universal market access, and with the fruits of nearly three decades of operation as a governmentally-privileged and immune satellite operator. Moreover, nothing in S. 2365 will prevent Intelsat from using its present inter-governmental status from grabbing more resources in anticipation of going private.

The fact that the new Intelsat after the IPO will be "private" and, finally, susceptible to regulatory oversight and legal liability, will in no way make up for the unfair market advantage that they will have on "day 1."

Conclusion

When I appeared before you in July 1997, I concluded my testimony by saying that the world is watching the United States for leadership in international satellite policy. The world is still watching. The FCC has acted. The House of Representatives has acted. This Committee should act by modifying S. 2365 so that it comes to grips with the fundamental issues presented by Intelsat's and Comsat's market dominance and sets in motion the mechanisms needed to assure achievement of the bill's policy objective, which PanAmSat shares, of creating a truly competitive marketplace for international satellite communications.